

**UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS**

IN RE: PHARMACEUTICAL INDUSTRY)
AVERAGE WHOLESALE PRICE) MDL NO. 1456
LITIGATION)

) CIVIL ACTION: 01-CV-12257-PBS
)
THIS DOCUMENT RELATES TO:) Judge Patti B. Saris
ALL CLASS ACTIONS)

)

**PLAINTIFFS' REPLY MEMORANDUM FOR A PROTECTIVE ORDER
CONCERNING NOTICES OF DEPOSITION AND SUBPOENAS
ISSUED BY DEY TO FALLOON COMMUNITY HEALTH PLAN AND
ABBOTT LABORATORIES TO HARVARD COMMUNITY HEALTH CARE**

Pursuant to L.R. 7.1(B)(3), plaintiffs respectfully submit this reply to Dey, Inc.'s and Abbott Laboratories' Memorandum of Law in Opposition to Plaintiffs' Motion for a Protective Order Concerning Subpoenas Issued to Certain Absent Class Member Third-Party Payors (Dey's Mem. Opp.") to address defendants' misstatements about rulings concerning the scope of Case Management Order no.10 entered by Judge Saris on March 4, 2004.

Case Management Order No. 10 entered March 24, 2004 requires a party to provide at *least 21 days notice* for a proposed deposition. Defendants argue that at a hearing on September 27, 2004, Chief Magistrate Bowler effectively modified CMO no. 10 by permitting defendants to notice all third-party depositions on seven days notice. As a result, they argue, their subpoenas to Harvard Community Health Care and Fallon Community Health Plan, served on nine and eleven days notice respectively, are not invalid.

The September 27, 2004 hearing involved, among other things, a motion filed by plaintiffs concerning depositions that had been *noticed* many months earlier, but that were being *scheduled* by the defendants in rapid succession after a long delay within a very short period of

time. Plaintiffs sought a ruling that the 21-day notice rule set forth in CMO no. 10 applied not only to the notice of depositions, but also to the “*confirmation* of all third party depositions.”

Plaintiffs’ Emergency Motion for a Protective Order dated September 10, 2004, at 1, annexed hereto as Exhibit A. Defendants countered that CMO no. 10’s 21-day applied to deposition *notice*, but not deposition *scheduling*. It was on this point that the Chief Magistrate Bowler ruled. Here is the colloquy:

THE COURT: Okay. Let’s talk about notice.

MR. SOBOL: Judge Saris issued an order saying 21 days. If they have shown good cause why that CMO should not be changed –

THE COURT: I mean, the 21 days obviously creates a problem at this point.

Mr. SCHAU: Sure.

The other answer to that, Your Honor, is that the 21 day rule applies to, you know, *we’ve given them more than 21 days notice of all of these depositions*. It’s just then you actually have to *schedule* it. So they know what –

Transcript of Hearing dated September 27, 2004, at 127:24 – 128:9, annexed hereto as Exhibit B.

The transcript of the hearing dated September 27, 2005 demonstrates that Chief Magistrate Bowler permitted the depositions challenged in Plaintiffs’ Emergency Motion for a Protective Order, which had been noticed months previously, to be scheduled on seven days notice. The ruling *did not* alter CMO no. 10’s 21-day notice rule.

Defendants say that “depositions have been routinely *scheduled* with no more than seven days notice,” *Dey Mem. Opp.* at 12, but they have not identified a single deposition that has been *noticed* on less than 21-days notice. Indeed, the recently issued deposition notices of Tufts Health and Neighborhood Health were both served on *more than* 21-days notice.

Defendants know their responsibilities under CMO no. 10, and if they believe they have legitimate discovery needs of Harvard Community Health Care and Fallon Community Health

Plan – which plaintiffs contest – they should notice those depositions pursuant to the requirements of CMO no. 10.

Wherefore, for the foregoing reasons, plaintiffs respectfully request that this motion be granted.

Respectfully submitted,

By /s/ David S. Nalven

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Dated: December 1, 2005

CERTIFICATE OF SERVICE

Docket No. MDL 1456

I, David S. Nalven, hereby certify that I am one of plaintiffs' attorneys and that, on December 1, 2005, I caused copies of the Plaintiffs' Reply Memorandum for a Protective Order Concerning Notices of Deposition and Subpoenas Issued to Fallon Community Health Plan, Inc. and Harvard Community Health Care, Inc. to be served via Lexis/Nexis File Serve on all counsel of record.

/s/ David S. Nalven

Dated: December 1, 2005